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"We Are Your Neighbors": How Communities Can Best Address a Growing Day-Labor Workforce

Amy Pritchard[1]

We build the buildings, we do the hardest jobs, and still they don't want us.

—Juan Ignacio Gutiérrez, day laborer

On September 4, 2007, the town of Herndon, Virginia, voted to close its day-laborer center that had become the focus of local controversy and national attention.[2] Less than two years before, Herndon established the center in response to chaos caused by large numbers of men congregating along local streets seeking employment as day laborers,[3] workers who are hired for and paid by the day. In order to eliminate this congregation, Herndon enacted ordinances prohibiting solicitation along town streets[4] and attempted to funnel the workers and potential employers to the day-laborer center.[5] Many local residents opposed the center—primarily because it did not verify the immigration status of workers—and ultimately voted to unseat the mayor and city council members who created it.[6] The newly elected governmental officials committed themselves to reforming the center to exclude all clients who did not verify that they were legally authorized to work in the United States.[7]

Local residents responded to Herndon's day-laborer center and antisolicitation ordinances with a series of lawsuits. A group of local residents, with the help of conservative watchdog group Judicial Watch, filed an action to enjoin the use of taxpayer funds for the day-laborer center

if it continued serving undocumented immigrants.[8] Another resident, ticketed for hiring a day laborer in the parking lot of a local convenience store, challenged Herndon's antisolicitation law on First Amendment grounds.[9] The Fairfax County Circuit Court held that the antisolicitation ordinance violated the First Amendment and that the town's decision to close the day-laborer center to noncitizens, when coupled with strict antisolicitation ordinances, violated the Fourteenth Amendment.[10] Unable to keep undocumented immigrants out of the day-laborer center—or to drive them from the town, as many desired—the town voted to close the center and relied on its zoning and traffic ordinances to restrict labor solicitation.[11]

During the year since the center's closure, day laborers have returned to congregating on town streets,[12] and the town council, struggling with the best way to control the negative impacts of unregulated labor solicitation,[13] has begun rethinking the closure of the center.[14] Ellen Kaminsky, a member of the group that ran the day-laborer center, stated that town officials rejected a successful solution—the center—in favor of overly harsh approaches to the issue.[15] "Herndon had already solved this problem," she said, "I think we're going backwards."[16]

The story of Herndon is repeating itself throughout the nation, in local communities that have become home to the almost twelve million undocumented immigrants currently in the United States.[17] Although the number of undocumented immigrants entering the country has slowed in the second half of this decade,[18] the number of immigrants who are in the United States illegally has grown 40 percent since the year 2000, and undocumented immigrants now make up nearly 4 percent of the country's total population.[19] Many undocumented immigrants find work in the day-labor market,[20] and as this population has grown over the past decade, many more communities are beginning to experience this phenomenon.[21]

Although the day-labor market may vary regionally, depending on the local area employment needs, certain characteristics of the market are

universal. Day laborers are at-will employees who solicit employment opportunities at informal day-labor hiring sites, including street corners, parking lots of home improvement stores and nurseries, sidewalks in residential neighborhoods, city parks, and organized day-laborer centers.[22] Employers who need a temporary worker will visit a hiring site and negotiate with the day laborers to find a worker with certain skills. The potential employer and employee negotiate over the terms of employment, including wages, and the employer then transports the worker to the job site. Wages are low and danger is high for these workers, and many day laborers experience exploitation, abuse, and labor law violations while on the job.[23]

Many community residents express the view that day-labor hiring sites create problems, including traffic congestion and parking difficulties, as well as other concerns associated with loitering, such as public urination, graffiti, and harassment of passersby.[24] Because of these concerns, many residents take a "not in my backyard" approach to having a day-labor hiring site or day-laborer center in their neighborhood.[25] Many localities such as Herndon have considered or passed a wide spectrum of ordinances penalizing local residents for soliciting employment and employees or for hiring undocumented day laborers.[26]

This article argues that local ordinances that criminalize day-labor solicitation and utilization will fail because (1) these ordinances unconstitutionally restrict a person's freedom to solicit employment relationships, and (2) they disregard the community's demand for informal, low-wage labor. Fundamental changes are needed in U.S. immigration law, particularly with regard to the number of workers allowed to enter the country legally to meet the country's labor demand; however, until this reform occurs, undocumented workers will continue to seek employment, and employers will continue to seek to hire them.

The day-labor workforce presents specialized problems for local governments: it is extremely informal, workers are extremely vulnerable to

exploitation, and informal hiring sites can be disorderly. The best government response to day labor includes initiating and continuing a dialogue with all interested stakeholders, including the local residents who work as day laborers, who utilize day labor services, and who oppose the day-labor workforce, in order to develop solutions that serve the whole community. These solutions may include increased regulation of solicitation and employment of day laborers, the replacement of informal hiring sites with formal day-laborer centers, and the establishment of community partnerships to protect workers' labor rights.

Part I of this article provides background on the current day-labor workforce, including demographic information on the individuals who make up this workforce and the economic factors that have contributed to its growth. Part II provides an overview of the legal protections and rights of day laborers. It discusses the constitutional right day laborers have to solicit employment and the employment laws that sometimes protect day laborers.

Part III looks at local efforts to restrict or prohibit the employment of day laborers and the concerns of communities that house day-labor hiring sites. In response to these concerns, states and localities have passed legislation penalizing employers for hiring undocumented workers, restricting a day laborer's ability to solicit employment, and criminalizing community organizations and others who facilitate the employment process. However, this section will also discuss why this type of legislation is flawed: many of these ordinances are preempted by federal legislation, infringe on residents' constitutionally protected rights, and fail to address the problems of economic exploitation and dangerous working conditions.

Finally, Part IV examines comprehensive community responses that build on dialogue between the workers and community stakeholders and address many of the concerns raised in the previous parts. Proposed solutions include promulgating legislation that protects workers and regulates—rather than bans—the process of day labor; creating formal day-laborer centers;

and developing stronger relationships between unions and day laborers. These approaches more effectively address the interests of workers, employers, and other community members, and improve the community for all its residents.

I. THE DAY-LABOR EXPERIENCE

A. The Day-Labor Workforce[27]

On any given day, there are an estimated 117,600 day laborers searching for work.[28] The day-labor market is a noticeably homogenous workforce: it is almost exclusively male (98 percent),[29] overwhelmingly foreign-born Latinos,[30] and principally undocumented (75 percent).[31] Most are recent immigrants[32] with very little formal education.[33] For the majority of day laborers (83 percent), day labor is their sole source of income.[34]

Day laborers typically find work in two location types: informal pick-up sites and formal hiring halls. More than three-quarters of day laborers (79 percent) gather at informal hiring sites—which include spots near home improvement store parking lots, on streets or sidewalks—to await pick up by employers.[35] The remaining day laborers find work at formal day-laborer centers, which have a permanent site and formal hiring procedures.[36] As of January 2006, there were sixty-three formal day-laborer centers nationally.[37] Part IV discusses these formal day-laborer centers in greater depth. The majority of day laborers are hired either by homeowners for tasks including clean up, moving, and gardening (49 percent), or by contractors to work in construction, landscaping, and related jobs (43 percent).[38] Companies and other day laborers also employ day laborers. [39]

Day labor appeals to the recently arrived, undocumented immigrant population for several reasons. Day labor offers many recent immigrants a first job in the United States, giving them the opportunity to earn money while developing work experience, job skills, and potential employer

contacts.[40] Additionally, the "no questions asked" nature of day labor—where a worker can obtain a job without providing extensive work history or documents verifying employment authorization—provides employment opportunities to individuals who face barriers entering the formal job market, such as a lack of immigration documentation or limited English language proficiency.[41] Furthermore, day labor pays cash daily, which is very appealing to those who may not have the documentation needed to open bank accounts or who may be unable to await a bimonthly paycheck.[42] Finally, many workers feel a sense of autonomy with day labor—if they are not happy with conditions offered by a prospective employer, they have the flexibility to negotiate or to refuse the position.[43]

Although day labor may be a convenient employment opportunity for a recent immigrant, it provides extremely low wages. The median hourly wage for day labor is ten dollars.[44] However, job instability, fluctuating demand, unpaid wages, and wages lost to on-the-job injuries lead to low monthly earnings. Respondents to a national survey of day laborers reported that during the summer peak employment period of June and July 2004, their median monthly income was seven hundred dollars,[45] demonstrating the low and inconsistent earnings experienced even during the highest demand months. Although at some informal hiring sites workers have attempted to increase earnings by setting a minimum wage for the site, their power to organize is limited by the fact that many other workers, both on-site and in nearby towns and communities, continue to take lower wages.[46]

In summary, across the country the day-labor workforce is a relatively homogeneous workforce comprised largely of recently immigrated Latino males. Although day-labor jobs appeal to many as a way to enter into the U.S. labor force, the low earning potential of these jobs makes day labor an unappealing long-term career.

B. The Growth of the Day-Labor Market

Day-labor markets have existed in different forms since medieval times, and currently exist in many countries around the world.[47] In the United States, the day-labor market has grown significantly in the past three decades due to three factors: economic globalization, a trend toward informal employment relationships, and increased immigration into the United States.[48]

Globalization, and the resulting restructuring of local economies, has brought many Latin Americans to the United States in search of employment.[49] After the debt crisis in 1982, Latin American government officials reduced barriers to trade, privatized state-owned industries, eliminated subsidies, and began deregulation of industries.[50] By the end of the 1980s, economic liberalization was occurring throughout Latin America.[51] Over the past two decades, many governments restructured their agricultural industries, leading to job losses in an already low-paying industry.[52] Widespread job losses were also experienced in the construction and manufacturing industries.[53] In many Central and South American countries, the impact of these job losses has been compounded by decades of civil war, which has limited economic opportunities and led to mass emigration.[54] While an overwhelming majority of day laborers were employed in their home countries before emigrating,[55] underemployment and low wages caused them to emigrate.[56]

Many Latin American immigrants come to the United States after hearing about job opportunities, in order to earn money to support their families and communities.[57] Many of these immigrants send earnings back to support their families in remittances.[58] In 2004, the amount of money sent to Latin America in remittances was nearly forty-five billion dollars.[59] In Latin America, remittances have been responsible for lifting an estimated 2.5 million people out of poverty.[60] For Mexico, remittances are the country's second-largest source of foreign income, behind oil exports.[61] Although not the focus of this paper, remittances are an important reality in the global

economy, and the importance of remittance money to the families and communities in their home countries helps to illuminate why many immigrants come to the United States and are willing to do day-labor work.

Although many Latin Americans decided to emigrate to find better employment, a large number have been unable to enter legally.[62] Limited options exist for Latin Americans to immigrate to the United States legally or to legalize their status once they have arrived.[63] However, the lack of legal options for entering the United States has not prevented many individuals from entering the country. In recent years, the flow of undocumented immigrants into the United States has been substantial, resulting in a 40 percent increase in the number of undocumented immigrants living in the United States between 2000 and 2008.[64] Undocumented immigrants make up 30 percent of the total foreign-born population,[65] and undocumented immigrant workers account for almost 5 percent of the civilian labor force.[66]

As the number of Latin Americans entering the United States for employment opportunities has grown, so has the prevalence of informal employment arrangements. The U.S. economy has transitioned its focus from manufacturing to the service industry, as many manufacturing jobs have moved overseas, decreasing the number of full-time career opportunities for low-skilled workers.[67] In addition, factors such as the growth of self-employment, the increased use of subcontracting, and an expanded cash economy have created additional demand for temporary informal workers.[68] In turn, day labor is an informal labor market that fills this demand.

The demand for informal workers has grown substantially in the building and construction industry. A commercial and residential construction boom, coupled with the retirement of many baby-boomer-generation workers, has created a national increase in demand for construction labor and a shortage of skilled workers.[69] The building trades have experienced difficulty finding U.S.-born workers to meet labor demands.[70] The

construction industry has become increasingly competitive, which has led many contractors to turn to informal workers to lower costs and undercut other bids.[71] Additionally, more homeowners are bypassing contractors and hiring day labor for home improvement projects, thus increasing the demand for this specific type of informal worker.[72] This national trend towards informal labor within the construction industry has led to an increased demand for day laborers.[73]

These three factors—globalization, immigration, and the growth of the informal labor market—have contributed to the increase in the number of undocumented immigrants who are entering the U.S. labor market as day laborers to meet the need for low-cost, temporary labor.

C. Community Responses to Informal Day-Labor Hiring Sites

As the number of day laborers and the demand for informal labor have increased, the number of day-labor hiring sites has also grown.[74] Competing community interests have accompanied this growth: while many residents employ day laborers (who are also residents of the community), many residents also express concerns about the potential communal impact of a day-labor hiring site.

Some community members express a series of safety and economic concerns about the existence of day-labor hiring sites and the large number of day laborers and potential employers these sites attract. Many pick-up sites present parking challenges and traffic hazards as workers congregate on sidewalks and streets, sometimes "swarming" prospective employers' vehicles to negotiate employment or rushing unsuspecting vehicles.[75] Problems associated with loitering may arise at the sites, including littering, graffiti, public urination, and harassment of passerby.[76] Additional crimes may also occur at the pick-up sites. Such crimes include simple and aggravated assaults between and against day laborers; alcohol and drug use and drug sales by day laborers and others loitering at the site;[77] and robbery

and attempted robbery of day laborers, which, on occasion, has resulted in murder.[78]

Many community members argue that the presence of day-labor hiring sites leads to negative economic impacts on the neighborhood. Business owners sometimes complain that pick-up sites negatively affect their businesses because customers avoid visiting areas with day-labor pick-up sites due to the parking, traffic, and safety concerns.[79] Many people contend that large day-labor markets threaten the job security of full-time workers as the cost of hiring a day laborer who works at a below market-rate wage greatly undercuts the cost of providing a living-wage salary and benefits package to full-time workers.[80] Furthermore, many claim that the growing number of low-wage, immigrant workers with children creates an economic burden on the community that educates and provides social and health services to these children, especially in the case of day laborers who the community believes often work for cash and do not pay taxes or social security benefits on their wages.[81]

Opposition to day-labor pick-up sites can become emotional, with the community often directing its anger at the workers.[82] Opponents may try to paint all day laborers as drug dealers, sex offenders, and murderers.[83] The opposition is often a part of a larger anti-immigrant campaign against the influx of undocumented immigrants who take jobs away from those considered to be "real" Americans.[84]

Although many communities decry the presence of day laborers in their town, the irony lies in the fact that local residents and companies employ the day laborers, thus creating a demand for the day-labor market. As discussed earlier, area residents employ the largest percentage of day laborers in their own homes.[85] This strange tension between a community's expressed condemnation of day labor and the benefits it openly receives from utilizing such labor was illustrated when the Republican mayor of Bogota, New Jersey, running on an anti-immigration platform, was found to

have hired undocumented day laborers to help assemble his campaign yard signs.[86]

As this part has shown, while day laborers have come to many communities in search of employment, and while their presence meets the need for a contingent workforce, the unregulated hiring of day laborers can present challenges in the areas where the hiring occurs; and many area residents may oppose the day labor workforce and the larger immigrant community the day-labor workforce is a part of.

II. THE LEGAL RIGHTS AND PROTECTIONS OF DAY LABORERS

This section will first review the constitutional provisions that protect day laborers searching for employment and the federal employment laws that cover day laborers on the job. Next, this section will discuss how current labor laws inadequately protect the workplace rights of day laborers.

A. The Rights and Protections of Day Laborers

The Constitution protects certain rights for all persons, regardless of immigration status,[87] including day laborers looking for employment on city streets. The rights enumerated by the Constitution include the right to "liberty" under the Due Process Clause of the Fourteenth Amendment,[88] which the U.S. Supreme Court has interpreted to include the right to loiter on public property for innocent purposes.[89]

The Constitution also protects the act of solicitation, to varying degrees. The First Amendment right to free speech protects conduct so long as it "is sufficiently imbued with elements of communication."[90] The Supreme Court has held that in order for conduct to be protected by the First Amendment, there must be both intent to convey a particular message and a great likelihood that those around will understand the message, given surrounding circumstances.[91] In the case of day-labor solicitation, laborers dress in work clothes and congregate in areas where potential employers are likely to pass, thus conveying the message that their intent is to look for

work and creating a great likelihood that those around will understand that they are looking to be employed. Accordingly, a constitutional protection of this type of solicitation likely exists.

Although the majority of day laborers lack employment authorization, it is not illegal under federal law for an employer to hire a day laborer without first verifying employment authorization.[92] Employers are not required to verify employment authorization when hiring independent contractors, casual workers performing domestic tasks on a "sporadic, irregular, or intermittent" basis, or workers provided by a third party.[93] Thus, an employer is not required to verify the employment authorization of a day laborer he or she hires to help with short-term tasks such as yard cleanup or as an independent contractor to replace an ill full-time employee. However, it is against the law for the employer to "knowingly" utilize the services of immigrants without employment authorization.[94]

Once a day laborer is employed, federal and state employment laws protect them.[95] Federally, the Occupational Safety and Health Administration (OSHA) issues and enforces workplace safety and health standards to prevent work-related injuries, illnesses, and deaths.[96] Next, the Fair Labor Standards Act (FLSA) establishes minimum wage and age requirements for all employees.[97] While courts have consistently held FLSA covers all *employees* regardless of immigration status,[98] it expressly exempts independent contractors and therefore may not cover all day laborers.[99] Finally, the National Labor Relations Act (NLRA) protects the collective bargaining rights of employees and only applies to day laborers who are not considered domestic laborers or independent contractors.[100]

Although all of the above-discussed statutes cover all employees, the universal applicability of labor protections, regardless of immigration status, has been threatened by the 2002 Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*.[101] In *Hoffman*, the National Labor Relations Board (NLRB) had found that Hoffman Plastic Compounds had terminated the employment of workers

engaged in union activity, which is unlawful under the NLRA, and awarded backpay and other remedies to the wrongly terminated employees.[102] During the NLRB's adjudication of the complaint, one complainant admitted that he was not legally authorized to work in the United States, and the NLRB limited his backpay to the period of time between his unlawful dismissal and the time when it was disclosed that he could not work legally in the United States.[103] The Supreme Court reversed the award of backpay to the undocumented worker, holding that requiring an employer to pay backpay to an unauthorized employee "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[104]

State standards may also apply to day laborers, again depending on the type of employer and the nature of the work relationship. Most importantly, states must establish workers' compensation protections, which assist workers who obtain an on-the-job injury.[105] Although day laborers often face unsafe working conditions and a high risk of injury or death, many may not be covered by workers' compensation insurance.[106] In most states, workers' compensation statutes apply only to employers that have one or more full-time employee, and certain employers that have one or more regular part-time employee.[107] Furthermore, many statutes exclude casual work relationships and domestic laborers from their statutory definition of "employee."[108] Therefore, workers' compensation statutes often do not cover many day laborers, especially the large percentage who work for private homeowners. Often, day laborers who experience on-the-job injuries at private home jobsites may not have access to state workers' compensation protection and may have to pay for all of the expenses they incur as a result of their injuries. These uncovered workers may find that the only legal cause of action they have is suing their employer for tort damages in civil court.[109]

In some states, the *Hoffman* decision has also threatened limited state protections that exist for day laborers. Courts in many states, such as New York, New Jersey, Kansas, Pennsylvania, and Michigan, have entered judgments that limit or eliminate basic workplace protections for undocumented workers, including Workers' Compensation insurance, freedom from employment discrimination, and the ability to hold employers liable for workplace injuries.[110] Some states have also proposed ordinances that would exclude undocumented workers from workers' compensation coverage.[111]

The laws and cases discussed above indicate that while certain protections are available to all workers, day laborers experience weaker protections due to the type of employment relationship they have with their employers; as a result of the *Hoffman* decision, some may also face weaker protections due to their immigration status.

B. Limitations of Current Legal Protections for Day Laborers

In addition to the statutory exemptions and recent court decisions that limit the labor protections available to day laborers who are undocumented or have nonstandard employment arrangements, the very nature of the day-labor workforce hinders the effectiveness of labor protections. Day laborers are often more vulnerable to exploitation by employers because they are both unaware that protections exist and unwilling to seek relief when violations occur.

Day laborers experience a high rate of employment law violations and other abuses by their employers.[112] The national survey of day laborers found that large numbers of day laborers regularly experience mistreatment while on the job: in the two months prior to being surveyed, nearly half of workers (42 percent) had been denied food, water, and breaks by their employers; nearly a third (32 percent) had worked more hours than they had agreed to with the employer; over a quarter (28 percent) were insulted or

threatened by their employer; and nearly one in five (18 percent) were subject to violence by their employers.[113]

While day laborers experience a high rate of mistreatment and abuse, most of these occurrences go unreported to the authorities. The majority of day laborers have arrived in the United States within the past five years and are undocumented,[114] making them unaware of legal protections and hesitant to pursue them. Seventy percent of survey respondents did not know where to report workplace abuses.[115] Even when they know where to report abuses, many day laborers do not file complaints due to fears of not being paid for their work, losing their jobs, or facing employer retaliation, including the fear that employers will notify immigration officials and have them deported.[116]

Day-labor work arrangements are informal, and employers are often strangers, creating situations where employers are more likely to underpay or refuse to pay wages. Nearly half of the respondents to the national day-labor survey reported experiencing denial of wages in the two months prior to the survey date.[117] For example, after Hurricane Katrina, an employer recruited forty-six day laborers from Maryland to help with debris removal, promising them a wage of ten dollars an hour and to pay for all food and lodging expenses incurred during their time in Mississippi.[118] After the work was completed, the employer refused to pay the workers for their total time worked, traveling, and on-call, in the amount of over seventy-five thousand dollars.[119]

While day-labor work can be extremely dangerous,[120] current workplace health and safety standards do not effectively protect day laborers. Nearly one in five day laborers nationally, and one in three in the Midwest, reported having been injured on the job.[121] Day-labor work is dangerous for several reasons. Day-labor jobs place workers in situations where they face hazardous chemicals, dust, and toxic emissions; use faulty equipment; lack protective gear and safety equipment; or lack the training needed to perform their job safely.[122] Contractors trying to keep costs low may

violate building codes and safety regulations, subjecting workers to dangerous conditions that may result in injury or death.[123]

Although OSHA expressly prohibits many of these unsafe working conditions, it is unable to effectively enforce such prohibitions. OSHA operates mainly by investigating individual complaints,[124] which makes the agency ineffective for day laborers because many do not know how to file a complaint or are afraid to do so. The short-term nature of day labor means employees may not be on a job site long enough to understand the risks of the site and file appropriate complaints, and OSHA's limited enforcement resources means that the agency may not be able to monitor the safety of day-labor worksites adequately.[125]

In addition to facing more dangerous working conditions, day laborers are less likely to receive relief when they are injured on the job. As discussed in the previous section, workers' compensation statutes often do not include workers who are employed by homeowners or as independent contractors, meaning most day laborers are not eligible for these benefits in many states. Many injured workers will not seek medical treatment due to their inability to afford health care or an employer's refusal to cover treatment. More than half (54 percent) of the respondents to the national day labor survey who were injured on the job in 2005 did not receive the medical care they needed, and just 6 percent of injured day laborers had their medical expenses covered by the employer's workers' compensation insurance.[126]

As this section has shown, although day laborers are covered by many federal and state laws, the combination of legal exemptions for contingent and "casual" workers, weakened protections for undocumented workers, and the particular characteristics of the day-labor population make these workers particularly vulnerable to economic exploitation, dangerous working conditions, and limited compensation for on-the-job injuries.

III. TREND OF LOCAL LEGISLATIVE RESPONSES TO DAY LABOR

While the nation debates federal immigration reform, local communities feel firsthand the changes created by the influx of undocumented immigrants. With nearly twelve million undocumented immigrants living in the United States[127] and no clear reform on the horizon, many U.S. citizens and local communities feel that the government is not doing enough to address this issue.[128]

In the case of day-labor hiring sites, some residents have become so frustrated with their local government's inaction toward day-labor hiring sites that they have begun taking the law into their own hands in attempts to force day laborers out of "their" neighborhoods.[129] Their efforts include conducting "labor watches," which involve photographing workers and their employers; conveying information about sites to Immigration and Customs Enforcement (ICE); and confronting workers verbally and with signs.[130] At times, these residents' actions have escalated into vandalism of day-labor pick-up sites.[131] Tensions between day laborers and their opponents have also escalated into physical confrontations.[132] In one neighborhood in Inwood, New York, when a group of homeowners was unable to persuade day laborers to move their hiring site through direct action, one angry homeowner brandished a gun and tried to force a worker to leave at gunpoint.[133] These responses to day-laborer hiring sites illustrate the passion that some individuals feel regarding the issue of immigration, as well as the lengths that they are willing to go on an issue they feel their federal and local governments are failing to address.

Similarly, many communities have begun feeling frustrated with the federal government's failure to address issues around illegal immigration and the undocumented workforce. Some of these communities have resorted to vigilante-style ordinances, taking the federal law into their own hands and, in many cases, violating the civil rights of local residents.[134] This section will examine the legality of local ordinances in light of the previously discussed federal protections afforded to all persons in the

United States. For the purposes of this discussion, examples of these ordinances are given in two categories: antisolicitation ordinances and employer-sanction ordinances.

A. National Government Responses to Undocumented Day Labor.

On June 28, 2007, the Senate refused to pass a comprehensive immigration reform package that would have increased security at the border and would have provided a pathway to legal status for the almost twelve million undocumented immigrants who live in the United States.[135] Although the reform was a cornerstone of President Bush's domestic agenda, it faced severe opposition by some key Republican leaders who portrayed the bill as an amnesty for immigrants currently in the country illegally.[136]

The failure of Congress to pass a comprehensive immigration reform bill came as a profound disappointment for the almost twelve million immigrants who await a pathway out of the shadows of society and into a more legitimate existence. In addition, Congress's inability to develop a solution to our deeply flawed immigration system has also affected the communities across the nation these immigrants call home.

Proposed federal responses to day labor are as varied as immigration reform proposals. In 2006, while the Senate was attempting to develop its comprehensive immigration reform package through the Border and Immigration Enforcement Act, it was also considering H.R. 4437.[137] The bill would have amended the federal Immigration and Nationality Act to require, among other provisions, formal day-labor centers to verify the immigration status of all clients it served.[138] It also would have expanded the scope of smuggling, transporting, and harboring undocumented immigrants so that the acts of formal day-labor centers could be considered criminal.[139] This bill would have kept undocumented immigrants from utilizing the services of formal day-labor centers, thus pushing them to

informal hiring sites and decreasing the resources available to them to ensure their workplace rights are protected.

As the federal government has struggled to create a comprehensive solution to illegal immigration and undocumented labor, local and state governments have responded to the issue in a myriad of ways. Some cities adopted "sanctuary" ordinances prohibiting city employees and police officers from asking people about their immigration status or from reporting undocumented immigrants to federal officials.[140] Other cities have considered or passed a wide spectrum of other ordinances regarding undocumented immigrants, including penalizing employers for hiring undocumented labor, penalizing landlords for renting to undocumented tenants, prohibiting day laborers from soliciting employment on city streets and sidewalks, and declaring English as the official language.[141]

B. Antisolicitation Ordinances

As discussed in Part II, ordinances that focus on limiting or banning a day laborer from loitering on public property to solicit employment raise strong constitutional concerns. However, many community ordinances address public concerns over day-labor solicitation sites by banning employers from soliciting day labor and banning day laborers from soliciting employment. This section will discuss the considerations courts have used in determining the constitutionality of antisolicitation ordinances.

Antisolicitation ordinances can prohibit solicitation in the entire community ("blanket"), in a particular location ("zoning"), or near a particular type of property such as businesses ("property").[142] As this section will discuss, the constitutionality of an antisolicitation ordinance depends on the extent of the prohibition.

Over the past year, several communities have attempted to prohibit day-labor solicitation. In Suffolk County, New York, the local government proposed an ordinance that would have fined individuals up to $500 for loitering on certain county roads in order to solicit employment.[143] The

county executive supported this measure as a means of controlling illegal immigrants, who he claimed threatened the way of life of Suffolk County.[144] The county legislature voted down the ordinance in a ten-to-six vote.[145] Similarly, the city of Baldwin Park, California, introduced an ordinance prohibiting day laborers from seeking work on public sidewalks without leaving a three-foot space for pedestrians to pass[146] and prohibiting "commercial speech" on streets, parkways, and parking areas of Baldwin Park.[147] A federal district judge issued a preliminary injunction against the ordinance, stating that had the ordinance been enacted, it likely would have unconstitutionally prohibited speech.[148] On August 15, 2007, the Baldwin Park City Council voted to repeal the ordinance.[149]

While these communities' antisolicitation ordinances raised constitutional concerns, municipalities have some autonomy in curtailing an individual's expression. In *Clark v. Community for Creative Non-Violence*, the U.S. Supreme Court allowed for "reasonable time, place, or manner restrictions" on expression—oral, written, or symbolized by conduct.[150] The Court held that restrictions on expression are valid if they meet a three-prong test—the government must prove that the restrictions "[1] are justified without reference to the content of the regulated speech, [2] . . . are narrowly tailored to serve a significant governmental interest, and [3] . . . leave open ample alternative channels for communication of the information."[151]

In the case of antisolicitation ordinances, courts have upheld ordinances when they uniformly prohibit certain conduct, rather than curtailing certain types of speech.[152] For example, in the case of *Xiloj-Itzep v. City of Agoura Hills*, the California Court of Appeals upheld the City of Agoura Hills' ordinance prohibiting any occupant of a vehicle from soliciting work from any person within the public right-of-way (public streets, highways, sidewalks, or driveways).[153] The court upheld the ordinance because the ban was on vehicle-addressed solicitation, a type of conduct, rather than a type of speech or certain messenger.[154]

The court provided a series of considerations which it used to determine whether the ordinance was constitutional, and in particular, whether the ordinance violated the First Amendment.[155] First, the court found the ordinance was a content-neutral regulation because it prohibited conduct (vehicle-addressed solicitation which was causing public safety concerns), rather than specific messages by a solicitor.[156] Second, the court found the ordinance served a legitimate public safety interest, which was preventing the traffic and safety concerns caused by vehicle-addressed solicitation. Third, the ordinance was not vague; it was narrowly tailored to that purpose, and left open "ample alternate avenues of communication."[157] In this ordinance, individuals were still free to congregate on public spaces and to solicit work from employers who were legally parked or not in a vehicle.[158]

In contrast, in the case of *Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) v. Burke*, the U.S. District Court found a similar ordinance that prohibited a broad range of vehicle-related solicitation violated both the First and Fourteenth Amendments.[159] The court found the county had a significant government interest in promoting the safety of pedestrians and motorists, combating traffic congestion, and "maintaining the quality of urban life" (which the court translated to mean "preventing activities such as harassment, littering, trespassing, and public urination and defecation").[160] However, in deciding whether the ordinance was narrowly tailored to its purpose, the county had the burden of proving that "a 'reasonable fit' existed between its legitimate interests and the terms of its ordinance."[161] The court found, however, that the restrictions were too broad, in both the geographical scope and types of speech covered by the ordinance, to make them a reasonable fit with the county's interests.[162] Furthermore, the court held that the county had failed to prove that alternatives existed for day laborers to solicit employment under the ordinance.[163]

These rulings indicate that a community cannot decide to prohibit the day-labor market completely, though the community does have a certain amount of latitude to determine where laborers and employers can solicit each other. For example, if a day-labor market is creating traffic congestion or safety risks at an intersection, the locality can prohibit vehicle-related solicitation at intersections or in streets. However, these prohibitions must be narrowly tailored to meet the interests of the locality, and must leave reasonable alternatives for the workers and employers.

C. Employer Sanctions

In addition to antisolicitation ordinances, some localities have also passed ordinances sanctioning employers who hire undocumented workers.[164] Because the day-laborer population is overwhelmingly foreign-born and principally undocumented Latinos, it is no surprise that community ordinances aimed at regulating day-labor employment practices often straddle both immigration and employment law. Accordingly, many of these ordinances clash with existing federal immigration and employment laws.

The power to regulate immigration is a federal power, but not every state or local statute that deals with immigrants is a regulation of immigration and therefore preempted per se by federal immigration law. In *De Canas v. Bica*, the U.S. Supreme Court outlined a three-part test for courts to use in determining whether a local immigration law is unconstitutional.[165] A state law is preempted if (1) Congress has manifested an express intent to preempt any state law; (2) Congress has intended to completely occupy the field in which the law attempts to regulate; or (3) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[166] If any of these elements are met, a court must find that the federal law preempts state law.[167]

Federal law preempts most local and state employment ordinances concerning undocumented immigrants. The recent decision in *Lozano v.*

Hazelton provides an example of the court's analysis of these types of local employment ordinances.[168] The city of Hazelton, Pennsylvania, attempted to enact the Illegal Immigration Relief Act Ordinance (IIRA), which provided strict penalties for employers who employed undocumented immigrants.[169] In the first federal decision on these types of ordinances, the court struck down the ordinance as being preempted by federal law and unconstitutional, stating that

> [e]ven if federal law did not conflict with Hazleton's measures, the city could not enact an ordinance that violates rights the Constitution guarantees to every person in the United States, whether [a] legal resident or not. The genius of our Constitution is that it provides rights even to those who evoke the least sympathy from the general public. In that way, all in this nation can be confident of equal justice under its laws. Hazleton, in its zeal to control the presence of a group deemed undesirable, violated the rights of such people, as well as others within the community. Since the United States Constitution protects even the disfavored, the ordinances cannot be enforced.[170]

The ruling in *Hazleton* makes it clear that, in the case of employment of immigrants, localities cannot punish employers for hiring day laborers if their ordinances are not authorized by federal employment statutes.

In the case of day laborers, federal preemption of local ordinances is clear. As discussed in Part II, many employers are not committing an illegal act when they hire a day laborer without verifying employment, as federal employment law does not require an employer to verify employment authorization for employees hired as temporary domestic workers or as independent contractors.[171] Therefore, a locality cannot sanction employers for employing day laborers in cases where it is legal under federal law.

Furthermore, sanctioning individuals for hiring undocumented labor may not be an effective means of preventing the hiring of undocumented workers. As discussed in Part I, the national economy relies on informal labor that is sometimes unauthorized. Homeowners, who make up the

majority of employers of day laborers, are likely making an economic choice when hiring day laborers rather than expensive contractors. Additionally, this informal labor is meeting a demand created by shortages of low-cost labor.[172] Because there is no evidence to support the idea that there is a similar pool of documented labor competing with day laborers for these low-paying, potentially dangerous positions, increasing employer sanctions may increase labor shortages. Furthermore, the reliance on a contingent workforce may actually increase because of these sanctions, as more employers may circumvent the formal hiring process and hire more independent contractors and temporary informal workers off-the-books rather than risk sanctions for hiring undocumented workers.[173]

D. Additional Issues with Local Ordinances

The constitutional challenges presented by local attempts to ban the solicitation and utilization of day labor may create a number of other unintended problems, including confusion over regional inconsistencies, potential employer discrimination against day laborers, and greater vulnerability for the day-labor and undocumented immigrant populations.

The first concern with specialized local ordinances regarding the solicitation and employment of day laborers is that each locality may create a slightly different ordinance, leading to regional inconsistencies. These inconsistencies make it difficult for businesses and individuals who utilize day laborers to be in compliance with each locality's ordinances. Furthermore, when ordinances vary greatly between adjacent localities, one locality's attempt to drive out a day-labor market may simply push it into the surrounding communities, thus dispersing the workers but not addressing the underlying demand for them.

Second, in the case of ordinances that prohibit the hiring of unauthorized workers, employers must be given the tools and resources to know when they are required to check an employee's employment authorization and to perform the check reliably. The current federal employment authorization

program is in a pilot phase and is at times unreliable.[174] However, if employers are not able to screen potential employees effectively, they may avoid hiring Latino workers altogether. Similarly, in order to ensure that the employers are not hit with strict penalties, they may avoid hiring day laborers based on the false assumption that they may not be authorized to work in the United States. These types of ordinances may encourage a system where some employers discriminate against all Latino workers, rather than face penalties for mistakenly hiring someone who is unauthorized.

Finally, criminalizing the solicitation and utilization of day labor may further increase the vulnerability of the day-labor population. The development of a trusting relationship between law enforcement and day laborers is important to ensure the safety of these workers who, as discussed in Part II, are particularly vulnerable to abuses and violence.[175] From a law enforcement perspective, local strategies focusing on arresting day laborers who are soliciting employment or enforcing immigration laws will not be effective in the long term. Arrests and immigration raids can destroy the trust between immigrant communities and law enforcement, thus making it less likely for immigrants to seek help when they are mistreated.[176] Furthermore, having law enforcement officers enforce these ordinances diverts resources from more serious crimes.[177] Finally, although a strong law enforcement initiative may disperse individuals from an informal hiring site, these types of initiatives alone do nothing to decrease the demand for contingent labor, and may only temporarily decrease the supply of day laborers.

V. FUTURE DIRECTIONS FOR LOCALITIES

Ordinances that attempt to outlaw the hiring of day laborers or to oust day-laborer centers from local communities not only neglect the constitutionally protected rights of day laborers but also ignore the reality of an ever-growing workforce. Regardless of community opinion, all

indications are that informal labor is here to stay: changes in the U.S. economy, as discussed in Part I, have made a contingent, low-cost workforce indispensable.[178] The court's ruling in *CHIRLA* underscored this reality: "the fact that numerous laborers feel compelled to take to the streets to look for day work should be a powerful reason . . . to seek a safe, long-term, and constitutionally valid solution to the problems stemming from reckless vehicle-addressed solicitation."[179] Day-labor work is hard and dangerous, and communities have a duty to protect the constitutional rights and the physical safety of these workers as they meet the community's labor needs.

Day laborers are becoming a noticeable part of many economies, and until comprehensive federal immigration reform occurs, many communities may have to develop solutions to the issues related to this workforce. However, these immigrants and their families are also an integral part of the communities in which they live. In order to create effective local solutions that meet the needs of all community residents, all area stakeholders—residents, businesses, government agencies, religious and charitable organizations, immigrant groups, unions, and day laborers themselves—should be involved in the dialogue.[180] Strategies fostering dialogue among stakeholders and educating citizens about day labor and the scope of local authority over day-labor markets may help create local solutions that have public support.[181]

This section will discuss comprehensive strategies that address the issues surrounding day-labor markets and meet the interests of all involved parties. Rather than attempting to criminalize and eradicate the day-labor market, comprehensive reform creates safe spaces for day-labor solicitation and increases protections for day laborers. This section will discuss model legislation, programs, and partnerships that can help communities work toward these goals while addressing community concerns regarding the hiring sites. Local communities should consider all of these strategies when addressing day labor and choose the strategies that best meet the needs of

all local residents, including workers, employees, and others who live and work in the area.

A. Model Legislation

States and localities have the power to implement legislation that can strengthen the protections available for day laborers and ultimately create safer communities. Six states currently have specific legislation affecting the rights of day laborers.[182] State day-labor laws can require written disclosures of the terms and conditions of day-labor employment, regulate what can be deducted from wages, and regulate certain day-labor brokers.[183]

The National Employment Law Project (NELP), a national legal advocacy group for low-wage workers, has conducted a survey of state day labor legislation and developed recommendations for model legislation.[184] The proposed legislation focuses on protecting workers' health and safety and on preventing violations of labor laws, as well as ensuring that workers receive proper wages for the work they perform.[185] For example, NELP advocates that states clearly and broadly define the "employer/employee" relationship and the term "day labor."[186] NELP also advocates for the implementation of strict health and safety obligations on day-labor employers, regulated transportation, and increased enforcement mechanisms for legislations.[187]

These policy considerations are particularly important to help protect the vulnerable day-labor workforce from exploitation and labor-law violations. Communities, especially states, looking to improve conditions for day laborers and increase the overall safety of the community can utilize many of the NELP proposals to improve working conditions and to address many of the current insufficiencies in labor laws that were discussed previously in Part II.

B. Workers' Centers and Formal Hiring Halls

Communities across the country have developed programs that can serve as a model solution to the problems of an unregulated day-labor workforce and inadequate worker protections. Specifically, the development of two different types of community centers has provided instrumental resources and protections to immigrant workers, in general, and day laborers, in particular. The first are workers' centers, which are usually nonprofit community service organizations offering a variety of services to day laborers. The second are hiring halls, typically housed by workers' centers, which are specifically designed to provide a formal hiring process for day laborers and offer resources to protect workers from exploitation.[188]

Workers' centers were created to support and organize communities of low-wage workers.[189] These centers first emerged during the 1970s and 1980s in response to the decline of institutions, such as unions, that historically provided workers with a vehicle for collective action.[190] They are typically "hybrid" centers, providing a variety of services, including social services (addressing basic needs and finding resources); advocacy; organizing; and day-labor hiring halls.[191]

Day-labor hiring halls are formal sites where employers and day laborers can solicit an employment relationship. As of January 2006, there were sixty-three formal day-laborer centers throughout the United States.[192] Of those centers, over half were established after 2000.[193] Most formal day-laborer centers provide space for workers to assemble; require job seekers and employers to register with center staff; set minimum wage rates; and monitor labor standards, employer behavior, and worker quality.[194] These qualities help address many concerns about the day-labor market.

Furthermore, the hiring halls can be physically structured to address many of the community concerns that arise when areas are not well suited for employment solicitation. For example, in order to address littering and public urination concerns, hiring halls have trash receptacles and restroom facilities.[195] Similarly, traffic disturbances can be regulated at a hiring hall

by designating an area where drivers can park in order to negotiate hiring arrangements.[196] Other offensive behavior that negatively impacts community residents, such as drinking and sexual harassment, can be addressed through a coordinated approach of community education, peer pressure, and law enforcement response when behavior is criminal.[197] Rather than having workers informally congregating on street corners, establishing formal hiring halls allows communities to set mutually accepted standards of behavior and conduct that benefit all involved.

While formal day-labor hiring halls may be an appealing option for communities, some day laborers report mixed experiences with the sites. For example, in California, 30 percent of workers surveyed generally experienced better working conditions when hired at formal rather than informal sites.[198] However, workers hired at formal sites reported working fewer hours than workers hired at informal sites, even when both groups spent the same amount of hours looking for work.[199] In order for formal day-labor hiring halls to be effective, incentives must be in place to ensure that workers and employers utilize the sites.

In order to improve the efficiency of day-laborer hiring halls and to keep informal day-labor pick up sites from developing in nearby neighborhoods, day-laborer hiring halls can coexist with city ordinances that prohibit solicitation in certain areas, thus funneling workers to areas and sites that work best for the community.[200] This approach helps to ensure that demand for day laborers at formal hiring halls is high and that the site becomes the best option for workers and employers. As discussed in Part III, this may also be the best solution for communities who, feeling the impact of an unregulated day-labor market, want to ensure that their efforts will be successful. This also benefits communities that have a strong interest in preventing the traffic and public safety concerns that may arise with an informal hiring site.

Because these centers develop from a partnership between the community and day laborers, they are uniquely situated to facilitate a

dialogue among community stakeholders to ensure that the best local solution is found. For example, in Seattle, a workers' center with a day-labor hiring hall, CASA Latina, proposed moving its facility from a location off a highway exit to a more residential neighborhood.[201] The center experienced community opposition to this move because residents of the neighborhood feared an increase in crime and other problems commonly associated with informal hiring sites.[202] Through a series of community meetings, a compromise was developed that met the interests of both the day laborers and the neighborhood.[203] This compromise included rules at the day-labor site that would keep workers inside the center until they were hired and would place a community ambassador on the street outside the center to prevent loitering and other problems from arising on the streets outside the center.[204] Although CASA Latina still may face some community opposition,[205] its strategy illustrates the dialogue needed to create a center that meets the needs of all neighborhood residents, including day laborers.

Furthermore, day-labor sites have begun organizing as a means of gaining organizing power for day-laborer centers and for sharing resources nationally. The National Day Labor Organizing Network (NDLON) was established in July 2001, and currently has a membership of approximately thirty-eight day-laborer centers.[206] The center had its first national meeting of day laborers in July of 2001, and has since worked to represent the interests of day-laborer centers on the national level.[207]

Although day-laborer centers may place localities in the best position to protect the day-labor workforce and meet the needs of the communities where these markets exist, they continue to face attacks by opponents. For example, as discussed in Part II, federal legislation proposed in 2005 would have criminalized these centers by making it illegal to aid undocumented immigrants, even without knowledge of their immigration status.[208] In Arizona, state legislation has also threatened to close down day-laborer centers.[209] Similarly, day-laborer centers face threats by private actions that

attempt to close down centers through litigation. For example, Judicial Watch, a national conservative watchdog organization, has begun suing local governments that it believes to be in violation of federal employment laws due to their financial support of local formal day-laborer centers and hiring halls.[210]

Day-laborer hiring halls offer a uniquely effective solution for meeting the community's needs and demands for labor, order, and safety in the labor hiring process. These halls also increase the protections and resources available to workers. While these halls are not a panacea, the development of these halls allows for community dialogue around how to best meet the specific needs of the local region; the implementation of these halls allows for all community members—workers, employers, and other residents—to create a structure that represents a compromise between all stakeholders' concerns and needs.

C. Day-Labor Partnerships with Unions

In addition to community partnerships and day-laborer centers, partnerships have developed between day-laborer centers and unions. These partnerships have the potential to help strengthen protections for the day-labor workforce and to give workers greater organizing power.

While the country's largest union, the AFL-CIO, historically did not support the causes of undocumented immigrants, this has changed in recent years.[211] The AFL-CIO has taken deliberate lobbying and litigation moves to protect the rights of this population and to push for comprehensive immigration reform with a pathway to citizenship for undocumented immigrants.[212] In 2000, the AFL-CIO launched a campaign against the temporary staffing agency, Labor Ready, for failing to pay its workers, violating labor laws, charging workers for check cashing services and equipment required to do jobs, and for ultimately undercutting the union workforce.[213] The AFL-CIO has also signed on as petitioners in two major

lawsuits seeking to protect the rights of undocumented immigrant workers.[214]

On August 9, 2006, a historic new partnership was announced between the AFL-CIO and the NDLON.[215] The two organizations articulated a series of objectives for their collaborative efforts, including advancing the workplace rights of day laborers, pursuing comprehensive immigration reform that supports workplace rights, supporting day-laborer centers, developing educational programs, and strengthening local collaboration.[216] In this partnership, day-laborer centers became nonvoting members of the AFL-CIO, but day laborers themselves did not become union members.[217] This partnership allows day laborers and the centers that represent them to be active participants in community- and national-level dialogue on labor issues.

Efforts to unionize day laborers could further increase this partnership and provide day laborers with collective power to protect their existing rights and to pursue comprehensive immigration and employment law reform. Support from unions can help day laborers lobby for legislation by building protections for day laborers,[218] creating pathways to greater legal standing and thereby establishing more legal protection for undocumented workers, such as the comprehensive immigration reform package debated in Congress in 2007.

To build on the partnership between the AFL-CIO and NDLON, Jayesh Rathod, human rights attorney and former counsel for CASA of Maryland, Inc., a workers' center, suggests a series of five proposals.[219] First, he proposes that unions develop "multilingual, culturally appropriate curricula related to occupational safety and health."[220] Second, he suggests that partners collaborate to advocate for stronger enforcement of the Davis-Bacon Act, a federal law that requires payment of prevailing wages and benefits to workers on all federal government construction contracts and on most federally assisted construction over two thousand dollars.[221] Third, he calls for implementation of educational campaigns that would increase

awareness and understanding of day-laborer centers and unions.[222] Fourth, Rathod recommends the establishment of formal partnerships between local day-laborer centers and local unions in order to facilitate the exchange of resources, skills, and services.[223] Fifth, he proposes the development of pathways for immigrant workers and day laborers to enroll in union apprenticeship and training programs, with unions modifying training programs to make them more welcoming to day laborers.[224] Rathod's proposals would serve to increase legal protections of the labor rights for day laborers and increase the day laborers' awareness of their rights and the resources available to them.

Although the partnership between the AFL-CIO and NDLON does not provide for the unionizing of day laborers, it may be a first step towards it.[225] The bylaws of nearly all unions do not prohibit undocumented immigrants from joining.[226] A day after the AFL-CIO and NDLON announced their partnership, the Laborers International Union of California, AFL-CIO members, announced a plan to unionize day laborers in California.[227] Unionization of day laborers would be a significant step in increasing protections for day laborers, as it would ensure that they had collective bargaining power to enforce wage and safety standards.

However, challenges exist to unionizing a labor force such as day laborers. First, because homeowners are the largest type of employers of day laborers, the union would find it nearly impossible to negotiate a contract with these employers, who may change daily.[228] However, unions could still negotiate with contractors, the second-largest group of employers of day laborers.[229] The unionizing of day laborers could be mutually beneficial to contractors and day laborers, as contractors could be guaranteed a steady supply of workers and laborers could be guaranteed basic wage standards and protection from retaliation.[230] Second, some current union members do not support the unionization of day laborers because they are concerned that day laborers undercut the market and harm the salaries and benefits of full-time workers.[231] Third and finally, attempts

to bring immigrant workers into a union labor force that is culturally and philosophically different may pose challenges. For example, in Maryland, an attempt to unionize day laborers of CASA Maryland by the Laborers Union failed, with issues of trust and different organizational cultures being cited as reasons for the failed partnership.[232] These challenges all demonstrate that unionizing the day-labor workforce would be a challenging, if not impossible, undertaking.

However, not all attempts at these partnerships have failed: workers' centers and unions have worked together to connect interested workers with unions, and workers' centers have been involved with organizing drives.[233] A survey of workers centers' found that most workers' centers (82 percent) collaborate with unions "occasionally," while most of the remainder (9 percent) has an ongoing relationship.[234]

While bringing all day laborers into union membership may not be a realistic next step, the partnership between the NDLON and the AFL-CIO is a promising step in the right direction. This partnership increases day laborers' ability to participate in the discussion about their community's labor needs. Unions' commitment to the rights of all workers is demonstrated by this partnership, and the AFL-CIO's efforts to partner with NDLON to ensure protections for this workforce will likely have positive outcomes for day laborers, even if they do not individually become union members.

D. Community Partnerships

As discussed above, partnerships between community stakeholders have been instrumental in creating workers' centers that provide services to immigrant workers and help address the traffic and safety concerns created by informal hiring sites. These partnerships can grow into other programs that provide strategies for addressing the issues faced by the day-labor workforce.

Partnerships between government and communities effectively balance the needs of all stakeholders. For example, the U.S. Department of Labor (USDOL) and the community-based organization National Interfaith Committee for Worker Justice (NICWJ) developed a program where the NICWJ performs outreach in immigrant communities and trainings in workers' centers and churches.[235] The organization also helps to negotiate wage payments when an employer does not pay wages or underpays wages.[236] When NICWJ cannot resolve a dispute, USDOL takes over to pursue a claim against the employer.[237] A similar partnership exists between the Washington State Department of Labor and Industries, CASA Latina Workers' Center, and the King County Bar Association.[238] The bar association recruits and trains lawyers and law students who volunteer at CASA Latina to advocate for workers on wage claims; when claims cannot be resolved, the Department of Labor and Industries undertakes wage-collection efforts.[239]

In addition to developing substantive programs, day laborers and residents can work together with local law enforcement to develop a community-policing model, creating a strong law enforcement presence to help discourage illegal behavior at hiring sites. There are disadvantages to this approach, including cost and the possibility that an increased police presence could lead people to believe that the area is unsafe.[240] In addition, as discussed in Part IV, increasing law enforcement presence may breed distrust between law enforcement and immigrant communities, as well as being an inefficient use of community resources.

Local and state governments can undertake efforts that can improve the working conditions for day laborers while addressing the concerns of other area residents. In order to develop the best approaches for a given area, local and state agencies and leaders should include representatives of all interested groups in discussions regarding community needs and potential responses.

VI. CONCLUSION

This article has shown how localities' attempts to enact a blanket ban on day labor will fail for several reasons. First, blanket ordinances prohibiting solicitation on behalf of day laborers or employers are unconstitutional if they are not narrowly construed to address a significant interest, or if they do not offer alternatives for day labor to occur in areas that do not negatively impact the government's interest. Second, sanctions on employers for hiring undocumented workers that are in excess of those that exist in federal employment law are unconstitutional because the federal government has expressed an intent to occupy the field of employment of immigrants. Thus, municipalities cannot legally ban all day-labor hiring within their boundaries.

Even if localities were able to impose blanket bans on day labor, this approach is not ideal. Changes in the economy have created a greater demand for informal and temporary labor, which the day-labor market fills. Therefore, strategies must be developed that help utilize this market while protecting the public from disturbances and workers from exploitation. Examples of these strategies include the implementation of regulations that protect the rights of workers, the creation of formal day-labor hiring halls, and the establishment of meaningful partnerships with existing community organizations and unions.

Until the federal government responds comprehensively to the issues of illegal immigration and undocumented labor, local communities are left to address the impact of these issues. After acknowledging the reality of the size and likely permanence of the undocumented immigrant population, it is important to include this population in the dialogue of reform in order to create effective partnerships that meet the needs of everyone involved. Therefore, it is essential that communities avoid taking an adversarial approach against day laborers. Instead, they should strive for a coordinated community response to this labor market, with the goal of creating safe spaces for employment solicitation and providing greater protections for the

workers, who are members of the community in which they work deserving all of its protections.

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[1] JD candidate, Seattle University School of Law, May 2009. The author would like to thank the editorial staff of the *Seattle Journal for Social Justice* for their helpful comments and careful editing; her husband, Willis Runyon, for his unwavering support and encouragement; and Professor Joaquin Avila for his invaluable feedback on this topic.

[2] After the town closed the doors on their center, day laborers in Herndon went back to the streets in search of employment. Saddened by many community members' attitudes toward them, they created signs to carry at their new informal site on the side of a road. One sign read, "WE ARE YOUR NEIGHBORS." Karin Brulliard, "*What We Had Here Was a Family," As Herndon's Day-Laborer Center Closes, Job Seekers Band to Find Another Site*, WASH. POST, Sept. 15, 2007, at B1; s*ee also* Bill Turque, *Herndon to Shut Down Center for Day Laborers*, WASH. POST, Sept. 6, 2007, at A1.

[3] Turque, *supra* note 2.

[4] The antisolicitation ordinance prohibits pedestrians from soliciting employment from anyone who was an occupant of a vehicle. It also prohibits the occupant of a vehicle, or someone who temporarily leaves a vehicle, from soliciting a pedestrian for employment. The ordinance applies to individuals on "any portion of a highway, sidewalk, driveway, parking area, or alley." HENRDON, VA., REV. ORDINANCES pt. 2, § 42-136 (2005), *available at* http://www.municode.com/resources/gateway.asp?pid=10218&sid=46.

[5] A zoning ordinance expressly allowed for town council approval of only one temporary assembly site, to be permitted for two years with up to three one-year extensions, and with the maximum number of workers allowed to be present on the site specifically outlined in the permit. HERNDON, VA., REV. ORDINANCES pt. 2 § 78-403.7(6) (2007), *available at* http://www.municode.com/resources/gateway.asp?pid=102 18&sid=46.

[6] Turque, *supra* note 2.

[7] *Id.*

[8] Carol Morello, *Suit Filed to Block Herndon Labor Site*, WASH. POST, Sept. 2, 2005, at B8.

[9] Turque, *supra* note 2.

[10] *Id.* A detailed discussion of the First and Fourteenth Amendment interests implicated in anti-solicitation ordinances follows *infra* in Part II, Section B.

[11] *Id.* Although it closed the center, the town interpreted the court's ruling to indicate that laborers had a right to solicit jobs on public property. Karin Brulliard, *Day-Labor Issue Has Cooled, but Only to Simmer*, WASH. POST, May 4, 2008, at C7.

[12] After the center closed, day laborers returned to soliciting on public streets. *Id.*

[13] Approaches considered by town officials include increasing police activity and zoning enforcement where workers gather, banning alcohol sales downtown, removing pay phones that the workers use to call their families in their home countries, restricting the

number of rooms available for rent in the town, and confiscating bicycles that are parked illegally in public places. Sandhya Somashekhar, *Herndon Could Tighten Screws on Day Laborers*, WASH. POST, Aug. 15, 2008, at B1.

[14] Gregg MacDonald, *Herndon Mulls Security Guard, New Site for Day Laborers*, FAIRFAX COUNTY TIMES, Sept. 17, 2008, at A4, *available at* http://www.fairfaxtimes.com/news/2008/sep/17/herndon-considers-security-guard-new-site-day-labo/.

[15] Somashekhar, *supra* note 13.

[16] *Id.*

[17] JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW 1 (2008), *available at* http://pewhispanic.org/files/reports/94.pdf.

[18] *Id.* at 2.

[19] In 2000, the number of undocumented immigrants in the United States was estimated at 8.4 million; in 2008, this number had grown to 11.9 million. *Id.* at i.

[20] Although not all day laborers are undocumented immigrants, the overwhelming majority of day laborers are currently undocumented (75 percent), and a very small percentage (7 percent) are U.S. citizens. Therefore, this article will examine the day-labor issue as one that is intrinsically intertwined with immigration reform. Similarly, as immigrants born in Central and South America make up 91 percent of the day-laborer workforce, this article will focus on immigration from this region. ABEL VALENZUELA, JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES, at iii (2006), *available at* http://www.uic.edu/cuppa/uicued/Publications/RECENT/onthecorner.pdf.

[21] Because the first nationwide survey of the day-labor market took place in 2006, there are no exact numbers to demonstrate this growth nationwide. However, the number of workers in certain regions and the number of day labor sites have grown in areas throughout the country. *See, e.g.*, *id.*

[22] Day Labor Research Institute, http://daylaborinfo.org/default.aspx (last visited Nov. 7, 2008). Unless otherwise specified, this and subsequent sections focus on situations that arise at informal hiring sites, which are largely unstructured, and not at formal day-laborer hiring halls and worker centers. These formal centers will be discussed in depth in Part IV.

[23] *See* VALENZUELA, JR. ET AL., *supra* note 20, at ii.

[24] ROB T. GUERETTE, U.S. DEP'T OF JUST., DISORDER AT DAY LABORER SITES 3 (2006), *available at* http://www.popcenter.org/problems/pdfs/disorder_at_daylaborsites.pdf.

[25] Gary Emerling, *Day-Labor Center in NE on Hold; Officials Not Able to Find Suitable Location Near Shopping Plaza*, WASH. TIMES, Nov. 9, 2007, at A1; Michelle Trauring, *Protestors Want Huntington Hiring Station Closed*, NEWSDAY (N.Y.), June 8, 2008, at A30; Nancy Trejos, *Council to Ask County to Put Day-Laborer Center Elsewhere*, WASH. POST, Nov. 7, 2006, at B7; *see, e.g.*, Sara Jean Green, *Day-Labor Agency's Move Stirs 11th-Hour Opposition*, SEATTLE TIMES, Mar. 18, 2007, at B1.

[26] Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. § 23-212 (allowing Arizona courts to suspend or revoke business licenses of employers who knowingly or intentionally hired undocumented immigrant workers); City of Hazleton Illegal

Immigration Relief Act Ordinance, HAZLETON, PA., ORDINANCE 2006-18 § 4 (2006), *available at* http://www.hazletoncity.org/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf (declaring it unlawful for any "business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City"); *see, e.g.*, Philip Rucker, *Gaithersburg Ordinance Ruled Unconstitutional*, WASH. POST, Feb. 29, 2008, at B4 (making it illegal for anyone to seek work or hire workers on most city streets, sidewalks, and parking areas); *see also* Eamon Javers, *The Divided States of America: States and Municipalities Are Responding in Wildly Different Ways to Undocumented Workers*, BUS. WK., Apr. 16, 2007, at 67.

[27] This section contains the findings of the 2005 national day labor survey, as reported in VALENZUELA, JR. ET AL., *supra* note 20. Because this was the first-ever national survey of day laborers, this article relies on it almost exclusively for statistical data on day laborers.

[28] This number may fluctuate greatly, as new workers enter and leave the day-labor market on a daily basis. *Id.* at 4.

[29] *Id.* at 17. Because of the overwhelming percentage of day laborers who are male, this article uses the masculine pronoun "he" when referring to them.

[30] This percentage varies by region. For example, in the South, almost one in five day laborers is U.S.-born, with the majority born in Mexico (59 percent) and a large percentage born in Central and South America (32 percent). VALENZUELA, JR. ET AL., *supra* note 20, at 18.

[31] Of these, 11 percent have a pending application to adjust their immigration status. *Id.*

[32] One in five day laborers have been in the United States less than a year, 40 percent have been in the United States for one to five years, 29 percent have been in the United States for six to twenty years, and 11 percent have been in the United States for more than twenty years. *Id.*

[33] Just over half of all day laborers (58 percent) have had fewer than nine years of formalized education. *Id.* at 19.

[34] *Id.* at 9.

[35] *Id.* at 4.

[36] *Id.*

[37] *Id.* at 6.

[38] *Id.* at 9.

[39] *Id.*

[40] *Id.* at 2. *See also* Juno Turner, Note, *All in a Day's Work? Statutory and Other Failures of the Workers' Compensation Scheme as Applied to Street Corner Day Laborers*, 74 FORDHAM L. REV. 1521, 1527 (2005).

[41] *Id.*

[42] *Id.* at 1528.

[43] *Id.* at 1527–28.

[44] One-quarter of all day-labor jobs reportedly paid more than twelve dollars an hour (usually highly skilled jobs including electrical and plumbing work). VALENZUELA, JR. ET AL., *supra* note 20, at 10.

[45] One-quarter of all survey respondents reported earning less than four hundred dollars, and only 7 percent reported earning more than sixteen hundred dollars. The median income during "good months" was as high as fourteen hundred dollars and was as low as five hundred dollars during "bad months." *Id.*

[46] *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 92–97 (2005). Many day-laborer centers set minimum wages, and there has been a national movement to partner with labor unions to help strengthen day-laborer wages. This is discussed further *infra* Part IV.

[47] Abel Valenzuela, Jr., *Day Labor Work*, 29 ANN. REV. OF SOC. 307, 312 (2003).

[48] *Id.* at 315.

[49] VALENZUELA, JR. ET AL., *supra* note 20, at 18.

[50] John P. Tuman, *Labor Markets and Economic Reform in Latin America: A Review of Recent Literature*, 35 LATIN AMER. RES. REV. 173, 174 (2000).

[51] *Id.*

[52] VALENZUELA, JR. ET AL., *supra* note 20, at 18.

[53] *Id.*

[54] For example, emigration from El Salvador increased substantially during the late 1970s and early 1980s in response to the onset of civil war. It is estimated that more than 25 percent of its population migrated or fled during the country's civil war, which began in 1979 and ended in 1992. Approximately 1.5 million Salvadorans now live and work in the United States. Similarly, after forty years of armed conflict, Colombia now has one in ten of its citizens living outside of the country. Myriam Bérubé, *Colombia: In the Crossfire*, MIGRATION POL'Y INST., Nov. 2005, http://www.migrationinformation.org/Profiles/display.cfm?ID=344. Another example is Guatemala, which saw over 400,000 of its citizens flee the country between 1960 and 1996 due to armed conflict and repressive dictatorships. James Smith, *Guatemala: Economic Migrants Replace Political Refugees*, MIGRATION POL'Y INST., Apr. 2006, http://www.migrationinformation.org/Profiles/display.cfm?ID=392.

[55] Ninety percent of respondents to the national day-labor survey were employed in their home country before emigrating. VALENZUELA, JR. ET AL., *supra* note 20, at 18.

[56] The decision to migrate is often influenced by other factors including job quality, long-term prospects, and perceptions of opportunity. Rakesh Kochhar, Pew Hispanic Ctr., *The Economic Transition to America*, *in* SURVEY OF MEXICAN MIGRANTS, PART THREE 3 (2005), *available at* http://pewhispanic.org/files/reports/58.pdf.

[57] VALENZUELA, JR. ET AL., *supra* note 20, at 18. Although the number of immigrants entering the country illegally had grown throughout the decade, the number seems to have decreased between 2007 and 2008, possibly because of decreasing economic opportunities in the United States. PASSEL & COHN, *supra* note 17, at ii.

[58] Diego Cevallos, *Latin America: Remittances Rescue Millions from Poverty*, INTER PRESS SERVICE, Nov. 25, 2005, http://ipsnews.net/news.asp?idnews=31189.

[59] *Id.*

[60] *Id.*

[61] Mike Nizza, *Money Sent Home by Mexicans Almost Stagnant in 2007*, N.Y. TIMES, Jan. 31, 2008, http://thelede.blogs.nytimes.com/2008/01/31/money-sent-home-by-mexicans-almost-stagnant-in-2007/.

[62] For example, between 1995 and 2005, nearly 80 percent of those emigrating from Mexico entered the United States without authorization. Kochhar, *supra* note 56, at 34.

[63] The most probable option for a Latin American (without specialized education or skills) who wishes to immigrate to the United States is a family visa or visa lottery, though both options require a substantial wait. For example, for spouses and children (under age twenty-one) of Permanent Residents hoping to come to the United States from Mexico, the wait time is approximately six years. Unmarried sons and daughters over the age of twenty-one have currently been waiting sixteen years for their visas to be processed. U.S. DEP'T OF STATE, VISA BULLETIN APRIL 2008, *available at* http://travel.state.gov/visa/frvi/bulletin/bulletin_4177.html.

[64] PASSEL & COHN, *supra* note 17, at 1.

[65] *Id.* at 3.

[66] RAKESH KOCHHAR, PEW HISPANIC CTR., LATINO LABOR REPORT, 2008: CONSTRUCTION REVERSES JOB GROWTH FOR LATINOS 3 (2008), *available at* http://pewhispanic.org/files/reports/88.pdf.

[67] Turner, *supra* note 40, at 1524.

[68] *Id.*

[69] Mark W. Avera, *U.S. Construction Industry Faces Skilled Labor Shortage*, TOP BUILDINGJOBS.COM, July 23, 2007, http://www.topbuildingjobs.com/news.php?articleID=27.

[70] *See* Kelly Davidson, *Labor Shortages and Immigration; Lack of Skilled Construction Workers Will Reach Critical Stage in Next Ten Years*, COLO. CONSTRUCTION, Mar. 1, 2007, at 26, *available at* http://colorado.construction.com/features/archive/0703_feature1.asp.

[71] VALENZUELA, JR. ET AL., *supra* note 20, at 2.

[72] S. Mitra Kalita, *For Day Laborers, Roles Change*, WASH. POST, May 21, 2005, at E1.

[73] Although growth in the construction industry has led to increased employment opportunities for immigrant Latinos, the recent downturn in the industry has hit Latino workers the hardest. Due mainly to this downturn, the unemployment rate for Latinos in the United States was 6.5 percent in the first quarter of 2008, compared to the unemployment rate of 4.7 percent for non-Latinos. Immigrant Latinos experienced an unemployment rate of 7.5 percent in this same quarter. KOCHHAR, *supra* note 66, at i.

[74] VALENZUELA, JR. ET AL., *supra* note 20, at i.

[75] GUERETTE, *supra* note 25, at 3; s*ee also* Nina Shapiro, *Trouble by the Day: While Loud Debate Rages over Casa Latina, an "Uncontrollable Problem" Outside Home Depot Offers Ammunition for Both Sides*, SEATTLE WKLY, Oct. 3, 2007, at 13 (quoting Seattle Police officer who stated that local business owners near a local Home Depot complained that day laborers at an informal hiring site mobbed cars, stopped traffic, and participated in other unruly behavior).

[76] GUERETTE, *supra* note 24, at 3; *see also* Shapiro, *supra* note 75 (quoting the property manager of a Home Depot building, who said that the informal hiring site had problems

with "drug activity, open-container drinking, public urination, defecation, [and] harassment").

[77] GUERETTE, *supra* note 24, at 3.

[78] Day laborers make an easy target for robbery because they often do not have bank accounts and therefore may carry cash. Those undocumented laborers also are vulnerable to targeting because they often are hesitant to report crimes perpetrated against them for fear that law enforcement may attempt to verify their immigration status or deport them. *See, e.g.*, Tonya Alanez, *Trial Begins for 2 Men Accused of Robbing Murdering Day Laborer in Pompano*, S. FLA. SUN-SENTINEL, Aug. 9, 2007, http://www.sun-sentinel.com/news/local/broward/sfl-flbimmigrant0809nbaug09,0,5415682.story.
Attacks against day laborers can also be racially motivated. *See, e.g.*, Elissa Gootman, *2nd Man Gets 25-Year Term for Beating Mexican Laborers*, N.Y. TIMES, Jan. 10, 2002, at B5 (discussing how juries found two men in New York guilty of the attempted murder of two day laborers after the men lured the day laborers to an abandoned building with the promise of work and then attacked them with digging tools and a knife); Matt Smith, *Epidemic of Violence Against SF Day Laborers*, SFWEEKLY.COM, Jan. 23, 2008, http://www.sfweekly.com/2008-01-23/news/epidemic-of-violence-against-sf-day-laborers/ (discussing the large number of assaults and murders perpetrated against day laborers in San Francisco).

[79] Keyonna Summers, *Shopping Center Pulls Out of Day Laborer Site Deal*, WASH. TIMES, Oct. 28, 2006, at A9 (quoting shopping center manager who pulled out of a deal to lease space for a day laborer center after business owners expressed concerns that the center would impede traffic and harm center business); *see, e.g.*, Brulliard, *supra* note 11. (quoting a Shell Station manager who says he experienced "a lot of problems" with Herndon's informal pick-up site, including trampled flowers and day laborers bothering the station's customers).

[80] GUERETTE, *supra* note 24, at 3.

[81] A 2006 Pew Research Center survey of attitudes regarding immigrants found that the majority of Americans (56 percent) felt that recent immigrants do not pay their fair share of taxes. However, a similar number of Americans (60 percent) reported that immigrants moving into their communities had not made much of a difference in the quality of local government services. PEW RESEARCH CTR. & PEW HISPANIC CTR., AMERICA'S IMMIGRATION QUANDARY: NO CONSENSUS ON IMMIGRATION PROBLEM OR PROPOSED FIXES 17–18 (2006) *available at* http://pewhispanic.org/files/reports/63.pdf. It is important to note that immigrants without social security numbers or legalized immigration statuses can file their taxes using an Individual Taxpayer Identification Number (ITIN). For more information on this see CTR. FOR ECON. PROGRESS, THE IRS INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER: AN OPERATIONAL GUIDE TO THE ITIN PROGRAM (2004) *available at* http://www.nilc.org/immsemplymnt/ITINs/ITIN_Paper_2004-web.pdf.

[82] *See, e.g.*, Lisa Rein, *Hate Calls Swamp Herndon Town Hall; Radio Host Had Urged Day-Labor Site Protests*, WASH. POST, Aug. 6, 2005, at B1 (detailing hate calls received by Herndon Town Hall after local radio host told listeners, "You need to help . . . Mayor O'Reilly understands he's advocating breaking the law . . . and assisting criminal aliens

who are in this country destroying this country, stealing jobs, running drugs, raping people," after the town of Herndon began discussing the creation of a day-labor hiring center.) *See also infra* notes 131–35.

[83] *See* Mauricio Espana, Comment, *Day Laborers, Friend or Foe: A Survey of Community Responses*, 30 FORDHAM URB. L.J. 1979, 1994 (2003) (quoting Sachem Quality of Life: About SqofL, Myths & Facts, http:// sqlife.org (last visited Apr. 21, 2003)).

[84] Stephen R. Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1, 34 (1997).

[85] *See supra* note 38.

[86] Jonathan Miller, *A Mayor with a Tough Stance on Immigration Is on Both Sides Now*, N.Y. TIMES, Oct. 16, 2007, at B6.

[87] The exact extent of protections extended to noncitizens and undocumented immigrants varies depending on the right in question. For a discussion of how constitutional rights apply to non-citizens, see Won Kidane, *Committing a Crime while a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 34 HASTINGS CONST. L.Q. 383, 386–407 (2007).

[88] U.S. CONST. amend. XIV, §1. The Supreme Court has held that the due process protections of the Fourteenth Amendment extend to all persons in the United States, regardless of immigration status. *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.").

[89] City of Chicago v. Morales, 527 U.S. 41, 53–54 (1999) (holding that the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment and that an ordinance requiring that "[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area" violated this constitutionally protected freedom). Although there is no discussion of immigration status in the case of *Morales*, the Court's holding that an individual has a constitutionally protected right to loiter for innocent reasons would undoubtedly extend to undocumented immigrants in the United States because, as discussed *supra* note 88, the due process protections of the Fourteenth Amendment cover all persons, regardless of immigration status.

[90] Spence v. Washington, 418 U.S. 405, 409 (1974) (holding that a peace sign taped to an upside-down American flag was speech protected by the First Amendment). In *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), the Supreme Court held that the freedom of speech and of press is accorded aliens residing in this country.

[91] Gabriela Garcia Kornzweig, Note, *Commercial Speech in the Street: Regulation of Day Labor Solicitation*, 9 S. CAL. INTERDISC. L.J. 499, 505 (2000); *See Spence*, 418 U.S

at 415 (holding that an upside-down U.S. flag with a peace symbol attached to it and hanging in a college student's window had both the intent of expressing the student's opinion that America stood for peace and a great likelihood that others around would understand that message, especially given the surrounding circumstances of the Cambodian invasion and Kent State incident, and therefore it was constitutionally protected conduct).

[92] States have various laws regarding the level of inquiry an employer must undertake into the immigration status of employees. THOMSON REUTERS/WEST, RESTRICTIONS ON EMPLOYMENT OF ALIENS, 6 EMP. COORD. EMP. PRAC. § 42:5. However, the extent of inquiry that must be undertaken into the immigration status of day laborers is often lower because in many cases a day laborer is just hired as an independent contractor or a casual worker. 8 C.F.R. § 274a.1(h) (2007).

[93] 8 C.F.R. § 274a.1(h) (2007).

[94] *Id.* at § 1274a.5.

[95] For a detailed discussion of the legal protections for contingent and "casual" workers, see Rebecca Smith, *Legal Protections and Advocacy for Contingent or ''Casual'' Workers in the United States: A Case Study in Day Labor*, 88 SOC. INDICATORS RES. 197 (2008).

[96] 29 U.S.C. § 651 (2007).

[97] *Id.* at § 203.

[98] Espana, *supra* note 83, at 1979.

[99] 29 U.S.C. § 203.

[100] *Id.* at § 152(3).

[101] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

[102] *Id.* at 140.

[103] *Id.* at 141.

[104] *Id.* at 151.

[105] THOMSON REUTERS/WEST, WORKERS' COMPENSATION LAWS, 2 COMPENSATION AND BENEFITS § 22:1 (2008).

[106] Turner, *supra* note 40, at 1532.

[107] *Id.* at 1532–33 (quoting MARK A. ROTHSTEIN, EMPLOYMENT LAW 406 (1994)).

[108] *Id.* at 1534–37.

[109] *Id.* at 1533.

[110] Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003), *cert. denied*, 684 N.W.2d 342 (Mich. 2004) (finding that undocumented workers are covered by Michigan workers' compensation law and are entitled to full medical benefits if injured on the job, but that their right to wage-loss benefits ends at the time that the employer "discovers" that they are unauthorized to work); Balbuena v. IDR Realty, LLC, 812 N.Y.S.2d 416 (N.Y. Sup. Ct. 2006) (holding that immigration status can be a factor to reduce benefits received by an undocumented worker's family in a wrongful workplace death claim); *see, e.g.*, Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99 (Pa. 2002) (holding that although an undocumented worker is entitled to medical benefits after experiencing a workplace injury, illegal immigration status might justify terminating workers' compensation benefits for temporary total disabililty).

[111] NAT'L EMP. L. PROJECT, MORE HARM THAN GOOD: RESPONDING TO STATES' MISGUIDED EFFORTS TO REGULATE IMMIGRATION 4 (2007), *available at* http://www.nelp.org/site/publications/P100/ (follow "More Harm Than Good" hyperlink).
[112] VALENZUELA, JR. ET AL., *supra* note 20, at 14.
[113] *Id*.
[114] *Id.* at iii.
[115] *Id.* at 15.
[116] *Id.* at 12.
[117] *Id.* at 14.
[118] Marroquin v. Canales, 505 F. Supp. 2d 283, 287–88 (Dist. Ct. Md. 2007)
[119] *Id.* at 289. Under the Maryland Wage Payment and Collection Law, this amount would have been subject to trebling because the employer willingly withheld these wages. The U.S. District Court in Maryland granted summary judgment for the plaintiffs on the issue of unpaid wages, awarded the plaintiffs $47,585.50 for unpaid wages, and ordered a trial on the issues of travel time, on-call time, and on whether the damages should be trebled. The parties settled shortly thereafter, with the employer agreeing to pay the workers $100,000. Cynthia Dipasquale, *Day Laborers from Maryland Get $100K Settlement for Katrina Work*, THE DAILY RECORD (Baltimore, Md.), Aug. 16, 2007, http://www.mddailyrecord.com/article.cfm?id=2309&type=UTTM.
[120] Nearly three-quarters of the respondents to the Valenzuela survey reported finding their work dangerous. VALENZUELA, JR. ET AL., *supra* note 20, at 12.
[121] *Id.*
[122] *Id.*
[123] Turner, *supra* note 40, at 1529.
[124] U.S. Dep't of Labor, Federal OSHA Complaint Handling Process, http://www.osha.gov/as/opa/worker/handling.html (last visited Nov. 7, 2008).
[125] *Hearing on Day Laborers Before the Council of the City of New York Comm. of Immigration* (Mar. 31, 2005) (testimony of Amy Sugimori, Staff Attorney, National Employment Law Project), *available at* http://nelp.3cdn.net/a135e9ff36d12e4a7a_c2m6bnau0.pdf.
[126] VALENZUELA, JR. ET AL., *supra* note 20, at 13.
[127] PASSEL & COHN, *supra* note 17, at 1.
[128] *A Nation of Immigrants, Divided Over the Subject of Immigration*, (Voice of America radio broadcast Mar. 2, 2008) (transcript available at http://www.voanews.com/specialenglish/archive/index.cfm?month=3/1/2008 (follow "A Nation of Immigrants, Divided Over the Subject of Immigration" hyperlink)).
[129] *See, e.g.*, Casey Sanchez, Southern Poverty Law Center, *Blunt Force: San Diego Nativist Group Faces Troubles*, 126 INTELLIGENCE REP. 26 (Summer 2007), *available at* http://www.splcenter.org/intel/intelreport/article.jsp?pid=1382; Susan McMillan, "*If We Can Take One Big Employer Down...*," BUS. WK., Aug. 21, 2006, at Section: News & Insights: Immigration.
[130] Anabelle Garay, *Hiring Sites Scrutinized as Part of Immigration Debate*, USA TODAY, Sept. 1, 2007, http://www.usatoday.com/news/nation/2007-09-01-day-laborers_

N.htm.

[131] *See, e.g.*, Sebastian Montes, *Day-Labor Center Fire Ruled a Hate Crime*, GAZETTE.NET, May 9, 2007, http://www.gazette.net/stories/050907/olnenew210300_32324.shtml (describing arson against a day labor hiring site, accompanied by threatening e-mails).

[132] Kristina Davis, *Keeping the Peace: Reports of Confrontations Between San Diego Minutemen, Day Laborers Require Increased Law Enforcement*, THE SAN DIEGO UNION-TRIBUNE, July 1, 2007, at N1.

[133] *See* GORDON, *supra* note 46, at 93.

[134] *See* Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U.L. REV. 1041 (2007).

[135] Robert Pear & Carl Hulse, *Immigrant Bill Dies in Senate; Defeat for Bush*, NY TIMES, June 29, 2007, at A1.

[136] *Id.*

[137] H.R. 4437, 109th Cong. (2005).

[138] *Id.* at § 702.

[139] *See* AMY SUGIMORI, NAT'L EMP. LAW PROJECT, ANALYSIS OF CERTAIN KEY PROVISIONS OF HR 4437 (SENSENBRENNER-KING) IMPACTING WORKER CENTERS (2006), *available at* www.nelp.org/docUploads/analysis%20of%20certain%20key%20provisions.pdf.

[140] *See* Steve Salvi, *Sanctuary Cities: What Are They?*, OHIO JOBS AND JUSTICE PAC: SANCTUARY CITIES, USA, Sept. 7, 2008, http://www.ojjpac.org/sanctuary.asp.

[141] By the end of 2006, over sixty local governments in twenty-one states had attempted to implement anti-immigrant ordinances. Sean D. Hamill, *Altoona, with No Immigrant Problem, Decides to Solve It*, N.Y. TIMES, Dec. 7, 2006, at A34. *See* Am. Civ. Liberties Union, Local Anti-Immigrant Ordinance Cases, http://www.aclu.org/immigrants/discrim/27848res20070105.html (last visited Nov. 7, 2008); *see also infra* note 169, Lozano v. Hazleton, 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007).

[142] Arturo Gonzalez, *Day Labor in the Golden State*, CAL. ECON. POL'Y, July 2007, at 13, *available at* http://daylaborinfo.org/research.aspx (follow "Day Labor in the Golden State" hyperlink).

[143] Nicole Cotroneo, *Suffolk Lawmakers Vote No on Bill to Curb Day Laborers*, N.Y. TIMES, Mar. 21, 2007, at B2.

[144] *Id.*

[145] *Id.*

[146] Press Release, Mexican Am. Legal Def. and Educ. Fund, City of Baldwin Park Repeals Anti-Day Laborer Ordinance (Aug. 16, 2007), *available at* http://www.maldef.org/news/press.cfm?ID=430.

[147] Eric Haas, *Criminalizing Labor, Conflict over a Local Law Restricting Day Laborers Could Be a Trial Case in the Ongoing War over Immigration*, LOS ANGELES CITYBEAT, July 19, 2007, http://www.lacitybeat.com/article.php?id=5862&IssueNum=215.

[148] Tiffany Hsu, *Limits on Day Laborers Halted—A Judge Questions the Legality of Baldwin Park Ordinance Curtailing the Solicitation of Work*, L.A. TIMES, July 17, 2007, at B4.

[149] Press Release, Mexican Am. Legal Def. and Educ. Fund, *supra* note 146.
[150] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). In the case of *Clark*, demonstrators who were permitted to participate in round-the-clock demonstration on the Mall in Washington, D.C., brought an action challenging the United States Park Service's denial of permission to sleep in a temporary structure permitted to be erected as part of the demonstration. The Supreme Court held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment, even when it prevented protestors from sleeping in the structures in an attempt to call attention to the plight of the homeless.
[151] *Id.*
[152] *See* Xiloj-Itzep v. City of Agoura Hills, 24 Cal. App. 4th 620 (1994). *See also id.*
[153] *Xiloj-Itzep*, 24 Cal. App. 4th 620.
[154] *Id.*
[155] *Id.* at 631.
[156] *Id.* at 636.
[157] *Id.*
[158] *Id.* at 631.
[159] Coal. for Humane Immigrant Rights of Los Angeles v. Burke, No. CV 98-4863-GHK2000 (C.D. Cal. Sept. 12, 2000).
[160] *Id.* at 3.
[161] *Id.* at 4.
[162] *Id.* at 8.
[163] *Id.* at 12.
[164] *See, e.g.*, Hamill, *supra* note 141.
[165] De Canas v. Bica, 424 U.S. 351 (1976). In *De Canas*, a group of migrant farm workers brought an action against farm labor contractors claiming that the contractors had refused them continuing employment after the contractors knowingly employed other aliens not lawfully admitted to the United States, in violation of a California statute. After applying its three-part test, the U.S. Supreme Court held that the California statute prohibiting an employer from knowingly employing an alien not lawfully admitted to the United States if such employment would have an adverse effect on lawful residents was not unconstitutional as a regulation of immigration or as being preempted under the supremacy clause by the Immigration and Nationality Act.
[166] *Id.* at 357–64.
[167] *Id.* at 356–64.
[168] Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007).
[169] *Id.* The Hazleton ordinances also imposed a $1,000 per day fine on landlords who rent to undocumented immigrants, declared English as the town's official language, and prohibited town employees from translating documents into another language without approval. The federal district court held that these ordinances were unconstitutional for a number of reasons, including federal preemption of the employment provisions and unconstitutional deprivations of due process and equal protection by the housing provisions. Specifically in the case of the employment provisions, the court held that the Federal Immigration Reform and Control Act (IRCA), which establishes a

comprehensive scheme prohibiting the employment of unauthorized workers in the United States, expressly preempts a city ordinance regulating the employment of undocumented immigrants. *Id.* at 518–21. In addition to finding that the employment ordinance was expressly preempted by federal statute, the court also held that the employment ordinance was impliedly preempted by federal statute because the scope of federal immigration law indicates that Congress intended federal law to occupy the field exclusively and the local ordinance conflicted with the federal law. *Id.* at 521–29.

[170] *Id.* at 555.

[171] 8 U.S.C. § 1324(a).

[172] VALENZUELA, JR. ET AL., *supra* note 20.

[173] NAT'L EMP. L. PROJECT, *supra* note 111, at 4.

[174] Electronic Privacy Information Center, *E-Verify System: DHS Changes Name, but Problems Remain for U.S. Workers*, EPIC.ORG, July 2007, http://epic.org/privacy/surveillance/spotlight/0707/#_ftnref50.

[175] GUERETTE, *supra* note 24, at 3.

[176] *Id.*

[177] *Id.* This is not meant to imply that law enforcement measures should not be undertaken to address the crimes that take place at hiring sites, but rather that these crimes, and not the day laborers' employment solicitation efforts, should be the focus of the law enforcement measures.

[178] *Id.*

[179] Coal. for Humane Immigrant Rights of Los Angeles v. Burke, No. CV 98-4863-GHK2000, at 13 (C.D. Cal. Sept. 12, 2000).

[180] GUERETTE, *supra* note 24, at 11.

[181] Joel Mills, *Find Homegrown Solution to Day Labor Issue*, CIVIC STUDIOS, Dec. 14, 2006, http://civicstudios.com/articlearchive/tt/1206_findhomegrown.html.

[182] Smith, *supra* note 95, at 210. These states are Arizona (ARIZ. REV. STAT. §§ 23-551 et seq. (2004)); Florida (FLA. STAT. ANN. §§ 448.20 et seq. (West 2004)); Georgia (GA. CODE ANN. §§ 34-10-1 et seq. (2004)); Illinois (820 ILL. COMP. STAT. 175/1 et seq. (2004)); and Texas (TEX. LAB. CODE ANN. §§ 92.001 et seq. (2004)).

[183] Smith, *supra* note 95, at 210.

[184] LUNA YASUI ET. AL, NAT'L EMP. LAW PROJECT, DRAFTING DAY LABOR LEGISLATION: A GUIDE FOR ORGANIZERS AND ADVOCATES (2004), *available at* http://www.nelp.org/site/publications/P300/ (follow "Drafting Day Labor Legislation" hyperlink).

[185] *Id.*

[186] *Id.* at 7–9.

[187] *Id.* at 19–22.

[188] *See, e.g.*, JANICE FINE, WORKERS CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 14–18 (2006).

[189] *Id.* at 11.

[190] *Id.* at 9–14.

[191] *Id.* at 12.

[192] VALENZUELA, JR. ET AL., *supra* note 20, at 7.

[193] *Id.*
[194] *Id.*
[195] ROBIN TOMA & JILL ESBENSHADE, LOS ANGELES COUNTY COMM'N ON HUMAN RELATIONS, DAY LABORER HIRING SITES, CONSTRUCTIVE APPROACHES TO COMMUNITY CONFLICT 5 (2001), *available at* http://www.lahumanrelations.org/publications/docs/Day%20Laborer%20All.pdf
[196] *Id.*
[197] *Id.*
[198] Gonzalez, *supra* note 142, at 2.
[199] *Id.*
[200] VALENZUELA, JR. ET AL., *supra* note 20, at 21.
[201] Kathy Mulady, *Casa Latina Now Welcome in the Central District*, SEATTLE POST-INTELLIGENCER, Nov. 9, 2007, http://seattlepi.nwsource.com/local/339010_casa10.html.
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] Jonah Spangenthal-Lee, *New Neighborhood Group Forms to Oppose Casa Latina*, THE STRANGER, Jan. 24, 2008, http://slog.thestranger.com/2008/01/new_neighborhood_group_forms_to_oppose_c.
[206] *See* National Day Labor Organizing Network Member Organizations, http://www.ndlon.org (last visited Nov. 7, 2008).
[207] *Id.*
[208] *See* SUGIMORI, *supra* note 139.
[209] *See* H.R. 2592, 47th Leg., 1st Reg. Sess. (Ariz. 2005).
[210] *See* Morello, *supra* note 8.
[211] *Immigration Policy and Low Wage Workers: The Influence of American Unionism: Hearing Before U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Border Security, and Claims*, 108th Cong. 16–23 (2003) (statement by Vernon M. Briggs, Jr.).
[212] *See* AFL-CIO Now Blog, AFL-CIO Supports REAL Immigration Reform, http://blog.aflcio.org/2006/03/01/afl-cio-supports-real-immigration-reform/ (last visited Nov. 7, 2008).
[213] Joseph B. Treaster, *Campaign Against Employee Supplier Intensifies*, N.Y. TIMES, Oct. 25, 2000, at C1.
[214] *See* Press Release, Nat'l Immigration Law Ctr, Court Halts Gov't from Implementing Flawed Soc. Sec. No-Match Rule (Aug. 20, 2007) (available at http://www.nilc.org/immsemplymnt/ssa_related_info/ssa004.htm).
[215] *See* Mike Hall, *AFL-CIO Partners with National Day Laborer Organizing Network*, AFL-CIO NOW BLOG, Aug. 9, 2006, http://blog.aflcio.org/2006/08/09/afl-cio-partners-with-national-day-laborer-organizing-network/.
[216] *See id.*
[217] Karin Brulliard, *AFL-CIO Aligns with Day-Laborer Advocates*, WASH. POST, Aug. 10, 2006, at A5.

[218] An example of this legislation is the unenacted Day Labor Fairness and Protection Act, first introduced in 2001, which in part protected and expanded the wage-and-hour rights of day laborers, ensured safe and healthy workplaces for employers, and imposed disclosure and record-keeping requirements on employees. It also guaranteed the First Amendment rights of day laborers and protected their rights to organize a union. Day Labor Fairness and Protection Act, H.R. 2755, 107th Cong. (1st Sess. 2001).
[219] Jayesh M. Rathod, *The AFL-CIO-NDLON Agreement: Five Proposals for Advancing the Partnership*, 14 HUM. RTS. BRIEF 8 (2007).
[220] *Id.*
[221] *Id.* at 9.
[222] *Id.* at 10.
[223] *Id.* at 11.
[224] *Id.* at 12.
[225] Brulliard, *supra* note 218.
[226] Peter Prengaman, *Day Laborers Present Challenges for Unions: The Rank and File Might Balk at Organizing Unions*, SEATTLE POST-INTELLIGENCER, Aug. 14, 2006, http://seattlepi.nwsource.com/business/281097_daylaborunion14.html.
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] FINE, *supra* note 189, at 131.
[233] *Id.* at 120.
[234] *Id.* at 121.
[235] NAT'L EMP. L. PROJECT, *supra* note 111, at 11.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] GUERETTE, *supra* note 24, at 21.